

1 JUDGE SIPPEL: How do you identify
2 -- How do you define a genre?

3 MR. COHEN: Well, I think, Your
4 Honor, there's a little bit of disagreement
5 about that.

6 JUDGE SIPPEL: That's a French
7 word you know.

8 MR. COHEN: Yes, it is a French
9 word.

10 JUDGE SIPPEL: -- assessing that.

11 MR. COHEN: Yes, and my French is
12 not very good. But a genre is a category of
13 documents. So I think it's fair to say that
14 there are -- Everyone will agree that there's
15 both an objective and a subjective component
16 of genre.

17 So to go back to the NFL case.
18 There's no disagreement that an NFL football
19 game falls into the genre of sports. But a
20 show --

21 JUDGE SIPPEL: But only if it's
22 agreed to.

1 MR. COHEN: Right. A show that
2 either views someone or the biography of a
3 world traveler, is it a travel show? Is it a
4 biography show? Is it a reality show? What
5 Your Honor is going to hear is that there is
6 one set of genres that a standard service
7 called the Tribune Media Services uses for the
8 purposes of TV listings. Those are the ones
9 that Comcast expert relied upon.

10 Our expert, Mr. Egan, did a
11 different genre analysis based on his 30 years
12 of experience. There's some fair degree of
13 overlap. I don't know how these genres were
14 created. Certainly, music is a genre of a TV
15 show. Adventure/travel is a genre of a TV
16 show. I don't know the high end cuisine is.
17 Music is. Sports is a genre TV show. So I
18 think it's a grouping of shows that fall into
19 a category.

20 But this document we object to for
21 exactly the same reason which is this is
22 another piece of expert work that Mr. Herring

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1 didn't create in the ordinary course of his
2 business. He did that after having the
3 benefit of reading all the expert reports in
4 this case in an effort to supplement his
5 expert's work.

6 MS. WALLMAN: Your Honor, if I
7 may. There have been a number of times when
8 what Mr. Herring tried to do in his testimony
9 is characterize his rebuttal. While I
10 acknowledge that there are some paragraphs
11 that refer to Defendant's experts and are in
12 the nature of rebuttal which I expect we'll
13 discuss this afternoon.

14 I don't want there to be any
15 mistake about what the methodology was. This
16 is something that Mr. Herring and his family
17 live and breathe every day and by and large
18 was not done in rebuttal to anything. It was
19 done in support of the case in chief that we
20 intend to put on about what happened what he
21 learned what Mojo was doing, what his
22 competitive reaction was to it and what his

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1 analysis of the similarities were not for
2 purposes of being an expert or rebutting any
3 expert but for purposes of running his
4 business. And I don't want the repeated
5 characterizations otherwise to rule the day.

6 JUDGE SIPPEL: No, I don't think
7 that means to reply. It's definite that the
8 man, he's in the business. Of all the genre
9 business that you talked about, he has to be
10 able to genre these things, I mean, as a
11 business matter, not as a critic or as an
12 economist.

13 MR. COHEN: And let me be clear,
14 Your Honor.

15 JUDGE SIPPEL: Economist --

16 MR. COHEN: The left side of these
17 charts he can genre, if we're going to use
18 this as a verb, his programming all he wants.

19 JUDGE SIPPEL: Right.

20 MR. COHEN: And that's where our
21 problem is. I'm not objecting to any piece of
22 his testimony where he purports to talk about

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1 his own network.

2 JUDGE SIPPEL: But don't -- Using
3 genre as a verb, doesn't your client do the
4 same thing with other competitors or potential
5 competitors? He must.

6 MR. COHEN: No. Well, first of
7 all, our client is a distributor of
8 programming. Our client gets presentations
9 from networks like Wealth in which they say,
10 "We have a sports network. We have a network
11 that focuses on the older demographic." But
12 we're not in the business of creating genres
13 of programming or categorizing program into
14 genre. No, Your Honor.

15 JUDGE SIPPEL: Well, if somebody
16 wants to put a program your sports channel and
17 you might have some questions to whether or
18 not it's a sport.

19 MR. COHEN: But we don't own the
20 channels. We don't own the networks. Time
21 Warner Cable and Time Warner are separate
22 companies.

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1 JUDGE SIPPEL: Okay. Well, let me
2 not go to that world.

3 MR. COHEN: Okay.

4 JUDGE SIPPEL: Let me stay where I
5 am. But there is something that you do and it
6 is maybe through Mojo that you do have your
7 executives are going to genre those. We can
8 leave a niche here we can go to because --

9 MR. COHEN: And just to clarify,
10 Your Honor, I think that's what I was trying
11 to say. So there are -- When people are
12 seeking carriage on Time Warner Cable, they
13 say, "Hey, I've got this good example,
14 retirement living" to move up the demographic.
15 "I've got this great new network that's focused
16 on retire people. That's a demographic and a
17 genre program that we think you're not
18 carrying and would be of appeal to some of
19 your audience." So, yes, in that sense we
20 consider genres.

21 But we're not the business of
22 assigning show by show to genres. That's not

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1 what a cable distributor does.

2 JUDGE SIPPEL: All right. Thanks
3 for breaking it up. Go ahead.

4 MS. WALLMAN: Your Honor, just
5 briefly. You'll hear in the fact testimony
6 offered by the Defendants their fact witnesses
7 saying, "I didn't think Mojo was like
8 WealthTV" and that inherently involves some
9 judgment as to genre. When you go to sell a -
10 - service to a cable distributor, they talk to
11 you about what genre do you have and they
12 compare it to the genres that they're already
13 carrying. So this is a business function and
14 I think it's widely acknowledged as such.

15 JUDGE SIPPEL: Where do I stand
16 now? Which side do I fall on here? I mean
17 both of you have good points, but --

18 MR. COHEN: I think all we're
19 trying to do, Your Honor, is to sit with your
20 reserve at the moment. I think this will get
21 sorted out in the course of the testimony.

22 JUDGE SIPPEL: Let me see if Mr.

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1 Beckner can shed some light.

2 MR. BECKNER: The only comment
3 that I had, Your Honor, was that and at least
4 from our perspective the big fallout here is
5 this is that you set up at the beginning of
6 the case a procedure which provided for
7 sequential disclosure of expert reports and no
8 rebuttals.

9 Now we all know that experts do is
10 that they give opinions and their opinions are
11 based on something, you know, their expertise
12 and whatever research they do. Now what
13 WealthTV has done is they've circumvented that
14 procedure by bringing in their client to offer
15 opinion testimony and this is what we're
16 talking about is opinion testimony. He's not
17 saying "I did this and I did that." He's
18 saying "In my opinion, these two programs are
19 different or they're better or they're not the
20 same and here's my little chart that explains
21 my opinion."

22 Now he might be qualified by

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1 virtue of his experience and his business to
2 give an opinion. But that really isn't the
3 point. The point is that he's giving an
4 opinion as opposed to simply testifying as you
5 say telling his story and the unfairness is
6 that you set up a procedure whereby these
7 opinions from experts would be disclosed in
8 the beginning. We have a chance, both sides
9 would have a chance, to depose the authors of
10 those opinions all before trial.

11 Now we have a new witness, in
12 effect, a new witness coming in offering a
13 bunch of opinions whom we haven't had a chance
14 to disclose. We have exhibits which he's
15 created summarizing his opinions which we
16 haven't had a chance to cross examine him
17 about.

18 Now we do all this at the trial.
19 I'm not saying we can't do it. But it's going
20 to make it longer and certainly I think unfair
21 and violates the procedures that you set up at
22 the beginning which was that the expert

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1 opinions would be laid out in advance well
2 before trial.

3 MR. MILLS: I could add one more
4 thing on this side if I could.

5 JUDGE SIPPEL: Yes. Please do.

6 MR. MILLS: There would be a
7 difference I think, Mr. Cohen mentioned this,
8 if these were historical documents. If Mr.
9 Herring were going to come in and say, "In
10 2006 or 2007 when such and such an event
11 occurred, I went out and I did this as a
12 matter of my normal business routine and I
13 compared these two networks and this is a
14 record of what I did at the time and that is
15 what I was thinking at that time."

16 That's not what this is. This is
17 as Mr. Beckner pointed out a new comparison.
18 That's his opinion in this case and to me
19 that's a very big distinction. This is not a
20 historical document. We could bring all our
21 witnesses in and do their own opinions about
22 all these sorts of things. It doesn't advance

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1 the ball.

2 The point of that testimony is
3 this is a matter of expert testimony. We
4 should leave at that and keep this case clean
5 and simple.

6 JUDGE SIPPEL: All right.

7 MR. ROSE: Two points.

8 JUDGE SIPPEL: Let's hear the
9 other side of the table. Mr. Rose.

10 MR. ROSE: This isn't a genre. I
11 think it was -- I've forgotten which Justice
12 of the Supreme Court was viewing some films
13 that were accused of being indecent and here
14 are all kinds of experts and the answer was "I
15 know it when I see it." This is what a
16 reasonable consumer --

17 JUDGE SIPPEL: I think I know who
18 it was. Go ahead. You keep going.

19 MR. ROSE: I think it was Justice
20 Douglas or Justice Blackman.

21 JUDGE SIPPEL: No, Douglas
22 wouldn't say something like that.

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1 MR. ROSE: Potter Stewart would.

2 JUDGE SIPPEL: Potter Steward.

3 Douglas would never say that.

4 (Laughter.)

5 MR. ROSE: This is a judgment
6 call. This is something that, yes, you can
7 have programming executives who say, "I've
8 seen hundreds of pitches and I know what a
9 genre is when I see." You have ad guys say,
10 "I pitch programs all the time to advertisers
11 and I know what they're looking for and I know
12 which programming is going to appeal to them."
13 And you can have people that develop
14 programming to say, "Yes, I developed
15 programming for these markets. I developed it
16 for the people that carry my program. I
17 developed it for the advertisers that pay for
18 them."

19 And Mr. Herring is in that
20 business. We're not saying it's a business
21 record. He didn't develop this years ago.
22 This is in the nature of something he would

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1 have written on the blackboard years ago. Now
2 he would do it as a PowerPoint in some courts
3 and in this court I believe he wants to do it
4 on poster boards. These are simply summary
5 exhibits of his opinion.

6 Is it a lay opinion or is it an
7 expert opinion is the question that's being
8 raised. We're not offering him as an expert.
9 Can a layperson opine on these things? We
10 think he can.

11 MR. FELD: And I would add, Your
12 Honor, again we come back to this. He's going
13 to get up and say as part of his story "And
14 then I saw that this programming was just like
15 my programming WealthTV." Well, how? So he's
16 set forth in a summary all of the things that
17 he's prepared to say. "Well, this is why I
18 think they stole my idea and this is why I
19 think their programming is similar." And
20 these are factual questions from his
21 perspective of a factual witness.

22 Now they're entitled to come back

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1 and say, "Is that really what you thought? Is
2 that really true? Didn't you describe
3 yourself in other ways?" And they'll come
4 back and say that and they're entitled to have
5 their expert witnesses come on and say, "Well,
6 he may think it looks the same, but if you
7 actually look at this objectively from an
8 expert standpoint we think that it's not the
9 same and other people wouldn't regard it the
10 same."

11 But in this case, it's really a
12 question of he's got to answer as the primary
13 factual witness a bunch of questions. What
14 was WealthTV about? What happened with the
15 carriage negotiation? Why do you think that
16 that was wrong of them to deny you carriage?
17 What makes you think they're same sort of
18 programming that it would rise under the
19 statute?

20 All this page does is take the
21 opinions that he will state orally about why
22 he thinks as a person who was involved in the

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1 negotiations. This happened and detailing the
2 facts and put them in a one page summary
3 that's simple to understand. It's not
4 presented as a document of an expert saying,
5 "This is a standard within the cable
6 industry."

7 JUDGE SIPPEL: Well, let me tell
8 you where I think I'm coming out on this. It
9 looks to me like I could receive this into
10 evidence as a summary of what he would testify
11 to if he were asked these questions
12 individually. And it is a time saving
13 document in that case.

14 In terms of his conclusions on
15 Mojo, if I can use this word, genre or
16 whatever, it's his best guess. But at least
17 it does it corrals him as a witness instead of
18 having him go on and amplify each of these
19 ingredients except to the extent that you want
20 to do that on cross examination.

21 I mean there's an element of risk
22 here from the standpoint of WealthTV, but

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1 they're willing to take the risk.

2 MR. COHEN: Although his direct
3 testimony, Your Honor, talks about all of this
4 at great length. So that's not really a
5 timesaver because he's going to put into the
6 record --

7 JUDGE SIPPEL: That's what I'm
8 saying is going to -- Look. If you sit down
9 to negotiate with the other side, you can look
10 at it this way. You can say, "Look. This guy
11 he told us that he's going to receive this as
12 a summary of his testimony."

13 So why can't we just knock out
14 page 17 because that just amplifies what he
15 summarized? I mean you have leverage to cut
16 back.

17 MR. COHEN: I understand.

18 JUDGE SIPPEL: And I don't see how
19 this thing is that -- that's just not that hot
20 a document. Numbers, projections and things
21 like that they're scary.

22 MR. COHEN: Again, Your Honor, I

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1 don't want to -- It's probably true. I don't
2 want to belabor.

3 JUDGE SIPPEL: Go ahead.

4 MR. COHEN: But let me just make
5 our point.

6 JUDGE SIPPEL: Belabor it. Go
7 ahead.

8 MR. COHEN: This is precisely the
9 opinions that the experts give. So our
10 complaint is that if he was going to offer
11 this testimony the time to do it would have
12 been on February 20th. We would have deposed
13 him. We would have had a much shorter cross
14 examination at the trial. We may or may not
15 have seen 106 page document. Our experts in
16 their written reports would have addressed
17 this.

18 Now what our expert has done is
19 said, "Well, Ms. McGovern, who is their
20 expert, this is what she has to say about the
21 genres. This is what I have to say in
22 response to Ms. McGovern." Now we have

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1 somebody coming in at the trial saying, "I
2 have a new opinion and some of it's consistent
3 with their experts and some of it may not be
4 consistent with their experts." So it's all
5 a question of the fairness in the procedure.
6 But we'll deal with the genre.

7 JUDGE SIPPEL: But I am not
8 receiving this as an opinion. If this were
9 listed by your expert or their expert and
10 being offered as an opinion, then I would look
11 at it in that fashion. All this is is this
12 is how he looks at life and it's a checklist
13 and if he goes off the checklist then he's got
14 a problem.

15 MR. COHEN: Okay.

16 JUDGE SIPPEL: So you've got to
17 bring that and you can use this as a basis I'm
18 hoping to knock out some of this gratuitous
19 lengthy narrative that you're talking about in
20 the case.

21 MR. COHEN: One hopes.

22 JUDGE SIPPEL: And then on top of

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1 that you have a cross examination weapon right
2 here. I mean you could ask him how does he
3 come to that conclusion and then you also can
4 do is you have your expert look at this, it's
5 only one page and your expert can tell us what
6 he thinks about it.

7 MR. COHEN: And indeed he will,
8 Your Honor.

9 JUDGE SIPPEL: All right. And
10 that's the purpose of -- I'm not bringing him
11 as a rebuttal. When I said that about
12 rebuttal witnesses, I mean you put your case
13 on, the case is closed, and then we have to
14 reopen because you're going to bring in
15 another expert as a rebuttal.

16 I'm not talking about using an
17 expert to critique what the other side is
18 trying to advance. That's a different form of
19 rebuttal and I don't look at that as rebuttal.
20 But whatever it is it's not the same thing I
21 was thinking of. I just don't want to extend
22 this thing another week because we have to

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1 bring in another cast of characters to rebut
2 so to speak.

3 But let's see -- but you
4 understand that. Now if you want to review
5 whether or not you want to continue to use
6 this document you can do that and I won't hold
7 it against you. But I have to give the other
8 side an opportunity to test it in several
9 ways.

10 MS. WALLMAN: Understood, Your
11 Honor.

12 JUDGE SIPPEL: Okay.

13 MR. COHEN: Your Honor, could I
14 suggest just --

15 JUDGE SIPPEL: Right now, it's in.

16 MR. COHEN: Should we perhaps go
17 back to sequential because I'm concerned that
18 if we don't we won't get through this. We're
19 skipping around and if that's helpful to Your
20 Honor and go back to 16 since 15 you said
21 we're going to deal with is the first of these
22 documents.

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1 JUDGE SIPPEL: Well, I don't want
2 to spend a lot of time on this one again. So
3 let's say subject to my ruling the 25 is
4 identified.

5 MR. COHEN: I wasn't going to
6 reargue that, when we got to 25.

7 JUDGE SIPPEL: But Mr. Schonman --
8 Wait a minute. Let me --

9 MR. COHEN: We're reserving is
10 what you had said, Your Honor.

11 (Whereupon, the documents referred
12 to were marked as WealthTV
13 Exhibits Nos. 15, 19, 21, and 25
14 for identification.) (Ruling
15 Reserved.)

16 MR. SCHONMAN: Yes, that was my
17 question. You said it was received, but did
18 you mean that you were going to reserve.

19 JUDGE SIPPEL: I want to reserve.
20 I'm going to reserve on this.

21 MR. MILLS: Fifteen, 19, 21 and
22 25. Correct?

1 JUDGE SIPPEL: Right.

2 MR. MILLS: Your Honor has
3 reserved.

4 MR. COHEN: Are reserved.

5 JUDGE SIPPEL: All right. Let me
6 go to my list. That's correct. Okay. Well,
7 I'm not going to expand on that at all.
8 That's exactly right.

9 MR. MILLS: We're on 16.

10 JUDGE SIPPEL: Pardon me?

11 MR. MILLS: We're on 16.

12 MR. COHEN: Sixteen, Your Honor.

13 JUDGE SIPPEL: We should be.
14 Again, I'm going fast on this. Mr. Schonman,
15 is there anything? Interject at something if
16 you have a concern.

17 MR. SCHONMAN: I will. Thank you,
18 Your Honor.

19 JUDGE SIPPEL: Ms. Wallman, the
20 same way. All right.

21 MR. COHEN: Sixteen, Your Honor,
22 is exactly -- I have the same argument as I

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1 had with -- We had understood after Your
2 Honor's ruling that you didn't want these
3 little snippets. So while they can make
4 whatever argument, if they're going to be able
5 to make little screen shots because in this
6 one picture taken on the one side, I don't
7 care what he says about his own witness, his
8 own show, and the Mojo show to show you guys
9 wearing khaki shirts and apparently that has
10 some great significance, this is exactly the
11 kind of material that the video was intended
12 to convey and we're disadvantaged at the
13 moment.

14 JUDGE SIPPEL: All right. I will
15 -- Ms. Wallman, who wants to make --

16 MR. ROSE: Your Honor, we did have
17 this discussion on some of the earlier
18 exhibits, six to 11. These are similar
19 comparisons and as Your Honor pointed out a
20 single shot is much easier to have in the
21 record than a video that needs to be --

22 MR. COHEN: Mr. Rose, six to 11

1 were their --

2 JUDGE SIPPEL: That's right.

3 MR. COHEN: This is comparisons.

4 JUDGE SIPPEL: That's right. He's
5 absolutely right. I'm going to -- Look. I'm
6 not going to belay for this one. These are --
7 I'm going to sustain the objection and the
8 comparison photos in 16, in WealthTV 16, I'm
9 denying the motion to introduce it. No. 16 is
10 identified for purposes of this case, but it
11 is not being received into evidence and I'm
12 not reconsidering it. So 16 is out, but again
13 it's in the record for purposes of appeal. If
14 you want to object to the ruling, that's fine.

15 (Whereupon, the above-referred to
16 document was marked for
17 identification as WealthTV Exhibit
18 No. 16, but was not received in
19 evidence.)

20 MS. WALLMAN: Thank you, Your
21 Honor.

22 JUDGE SIPPEL: What's the next

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1 one?

2 MR. COHEN: Seventeen and 18 I
3 assume are not being offered because those
4 were the comparisons that were made to rebut
5 the one ours.

6 MR. ROSE: But there are some DVDs
7 that the Defendant has listed and we just want
8 to be reciprocal about that. If they're going
9 to have DVDs, if they want DVDs, if Your Honor
10 is ruling that comparisons are out entirely,
11 they should all be out. That's our point.

12 JUDGE SIPPEL: So 17 and 18 are
13 moot. Is that right?

14 MS. WALLMAN: Yes.

15 MR. ROSE: The DVDs should also be
16 excluded if that's your ruling.

17 JUDGE SIPPEL: They're not being
18 offered. I mean you're not offering DVDs
19 because I've denied them the DVD rights.

20 MS. WALLMAN: Your Honor, I think
21 the ruling that you made was they would not be
22 played in the courtroom. I understood that

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